JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

Ansari bin Hj Abdullah v Public Prosecutor

HIGH COURT (BRUNEI DARUSSALAM) — CRIMINAL APPEAL NO 12 OF 2010
HAIROL ARNI MAJID J
2 DECEMBER 2010

Criminal Procedure — Appeal — Appellant seeking to overturn finding of facts by court — Conviction for causing road accident — Whether finding of facts against weight of evidence — Appellant remained silent when defence called — Whether magistrate erred in issuing adverse inference warning to appellant on election to remain silent — No adverse comment by prosecution on accused's election — Criminal Procedure Code s 221(5)

The appellant was found guilty and convicted by the magistrate's court for an offence under s 29(1) of the Road Traffic Act 1987 (Cap 68) and fined RM400 in default two weeks jail. At the trial, he elected to remain silent when his defence was called. According to the prosecution's case, the complainant, PW3, was riding her motorcycle along a road in Kampung Serambungan, Tutong, when, at a bend, a vehicle driven by the appellant and coming from the opposite direction collided into her throwing her off her motorcycle and on to the grass verge on her side of the road. The appellant appealed to the High Court against the decision on the grounds: (i) that the magistrate's finding of facts was against the weight of evidence; and (ii) that the magistrate wrongly construed and applied s 221(5) of the Criminal Procedure Code (Cap 7) ('CPC') when she made an adverse inference warning to the appellant when he elected to remain silent on defence being called. On the appeal against the adverse finding of facts, the disputed issue was the point of impact in the accident. Both parties in the accident claimed each had encroached into the other's lane. The appellant argued the magistrate wrongly found that the impact took place on PW3's lane despite ample evidence to the contrary. During the trial, the assistant investigating officer, PW4, who had prepared the sketch plan of the accident site, had testified that he had found plenty of glass fragments from the motorcycle's broken lamp in the middle of the road where the dividing line was, but had forgotten to indicate this on the sketch plan.

Held, allowing the appeal:

(1) The magistrate's findings were against the weight of the evidence as she had failed to consider PW4's testimony. Had she considered PW4's testimony as a whole she would have arrived at a different conclusion (see paras 7 &10).

(2) The slight damage on the appellant's vehicle was well on its right side

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

edge bumper and not the front right side of the vehicle. With this evidence and PW4's testimony, it was more likely the point of impact in the accident happened in the middle of the road rather than at 'X2' which was well on to the (complainant's) side of the road (see para 6).

(3) If PW3's version of the accident was accepted, it followed that the appellant's vehicle would have encroached on to PW3's path even before he had negotiated the bend. If that was so, there would not be any glass fragments in the middle of the road which was well out of the way from PW3's alleged point of impact at 'X2'. 'X2' was where the motorcycle ultimately came to rest after the impact (see paras 8–9).

(4) The magistrate's adverse inference warning to the appellant when the latter elected to remain silent was misconstrued because there was nothing on the record to suggest the prosecution had made any adverse comment on the appellant's election (see para 15).

(5) Under s 221(5) of the CPC only after having heard the prosecution's adverse comment on the defendant's election to remain silent could the court, if it chose to do so, draw adverse inference from the defendant's election. If the prosecution opted not to or failed to make any adverse comment, the court was not obliged to draw any adverse inference from the defendant's silence (see paras 11–14).

[Bahasa Malaysia summary

Perayu didapati bersalah dan disabitkan oleh mahkamah majistret bagi satu kesalahan di bawah s 29(1) Akta Pengangkutan Jalan Raya 1987 (Cap 68) dan didenda $400 jika gagal membayar dua minggu penjara. Semasa perbicaraan, dia memilih untuk berdiam diri apabila dipanggil membela diri. Menurut kes pihak pendakwaan, pengadu, PW3, sedang menunggang motosikalnya di sepanjang jalan di Kampung Serambungan, Tutong, apabila, di satu selekoh, kenderaan yang dipandu oleh perayu dan datang dari arah bertentangan berlanggar dengannya dan membuatnya jatuh dari motosikalnya dan ke atas rumput di jalan sebelahnya. Perayu merayu ke Mahkamah Tinggi terhadap keputusan tersebut atas alasan-alasan: (i) bahawa penemuan fakta majistret adalah bertentangan dengan berat keterangan; dan (ii) bahawa majistret telah salah mentafsir dan mengaplikasi s 221(5) Kanun Prosedur Jenayah (Cap 7) ('KPJ') apabila beliau membuat amaran inferens bertentangan kepada perayu apabila dia memilih untuk berdiam diri bila disuruh membela diri. Atas rayuan terhadap penemuan fakta yang bertentangan tersebut, isu yang dipertikaikan adalah poin impak kemalangan tersebut. Kedua-dua pihak di dalam kemalangan mendakwa satu lagi telah memasuki jalan yang satu lagi. Perayu menghujah bahawa majistret telah secara khilaf mendapati bahawa impak tersebut berlaku di jalan PW3 walaupun terdapat banyak keterangan yang bertentangan. Semasa bicara, penolong pegawai penyiasat, PW4, yang telah menyediakan pelan kunci tempat kemalangan, telah memberikan keterangan

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

bahawa dia mendapati banyak serpihan kaca daripada lampu motosikal yang pecah di tengah jalan di mana terdapat garisan pembahagi jalan, tetapi telah terlupa untuk menyatakan ini di pelan kunci.

Diputuskan, membenarkan rayuan:

(1) Penemuan majistret adalah bertentangan dengan berat keterangan kerana beliau telah gagal untuk mengambilkira keterangan PW4. Jika dia mengambilkira keterangan PW4 secara keseluruhan dia akan mencapai keputusan yang berbeza (lihat perenggan 7 & 10).

(2) Kerosakan yang sedikit pada kenderaan perayu adalah pada bahagian kanan bumper dan bukan pada bahagian hadapan kenderaan. Dengan keterangan ini dan keterangan PW4, adalah lebih berkemungkinan bahawa poin impak kemalangan berlaku di tengah jalan dan bukan di 'X2' yang adalah di bahagian jalan pengadu (lihat perenggan 6).

(3) Jika versi PW3 mengenai kemalangan tersebut diterima, ia diikuti bahawa kenderaan perayu akan memasuki jalan PW3 sebelum dia sempat membelok di selekoh. Jika ia adalah benar, tidak akan ada apa-apa pecahan kaca di tengah jalan yang adalah jauh daripada poin impak yang didakwa oleh PW3 di 'X2'. 'X2' adalah tempat di mana motosikal tersebut akhirnya berhenti selepas impak tersebut (lihat perenggan 8–9).

(4) Amaran inferens bertentangan majistret kepada perayu apabila dia memilih untuk berdiam diri adalah disalah tafsir kerana tidak ada apa-apa di dalam rekod untuk menyarankan bahawa pihak pendakwaan telah membuat apa-apa komen yang bertentangan mengenai pilihan perayu (lihat perenggan 15).

(5) Di bawah s 221(5) KPJ hanya selepas mendengar komen bertentangan pihak pendakwaan atas pilihan defendan untuk kekal berdiam diri, mahkamah boleh, jika ia memilih untuk berbuat demikian, membuat inferens bertentangan daripada pilihan defendan. Jika pihak pendakwaan memilih untuk tidak atau gagal membuat apa-apa komen bertentangan, mahkamah tidak terikat untuk membuat apa-apa inferens bertentangan terhadap pilihan defendan untuk mendiamkan diri (lihat perenggan 11–14).]

Notes

For a case on appellant seeking to overturn findings of fact by trial judge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 283.

Legislation referred to

Criminal Procedure Code s 221(1), (5)
Road Traffic Act 2987 s 29(1)

Ahmad Zakaria (Ahmad Zakaria & Associates) for the appellant.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

Asnawi Sharbawi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hairol Arni Majid J:

[1] The appellant was convicted after trial of concludes during an offence under s 29(1) of the Road Traffic Act 1987 (Cap 68). At the trial, he had elected to remain silent after having been called and advised of his election to defend. At the conclusion of the trial, the magistrate convicted the appellant of the charge and accordingly sentenced him to a fine of $400 in default of payment, two weeks custodial sentence.

[2] The facts of the prosecution's case is quite straightforward in that on the 31 October 2008 around 7.40pm, Siti Aminah bt Hj Mustari, PW3 was proceeding along the road of KM2 of Kampung Serambungan, Tutong riding her motorcycle. When she arrived at the vicinity of the KM of the said road while negotiating a bend, she collided with another vehicle, a Mitsubishi Pajero driver by the appellant who was proceeding from the opposite direction and encroached into her path, which resulted in PW3 being thrown off her motorcycle onto the grass verge on her side of the road.

[3] The gist of the appellant's appeal is basically two fold. Firstly, that the conviction was unsafe as the finding of facts by the magistrate was against the weight of the evidence. Secondly, the appellant contends that the magistrate was at err in law in construing and applying the provision of s 221(1) of the Criminal Procedure Code (Cap 7) when she made an adverse inference against the appellant failure to give his evidence on oath.

[4] As regards the appeal against the finding of facts by the magistrate is concerned, the only issue in contention is the point of impact. Both parties' claims each encroached on the other's lane. Mr Ahmad Zakaria for the appellant contends that the magistrate was at err in finding that the impact of the accident took place on PW3's lane. He impressed upon the court that there were ample evidence to suggest otherwise and these was not taken into account and considered by the court.

[5] The magistrate appears to accept PW3's version of the incident that the impact of at PW3's lane as shown by the remnants of the shattered glass. She said in her judgment:

> In cross examination, the defendant put to PW3 that the collision occurred at Y the middle of the road but PW3's motorcycle skidded to X2. PW3 disagreed saying that if she had been hit at Y she would have fallen at Y not X2.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

[6] Having scrutinised the notes of evidence of the trial, I believe that apart from the evidence of the complainant and the defendant, the testimony of PW4, L/Cpl 3329 Abd Malek bin Bujang very much shed some light of how the accident had happened. PW4 is the assistant investigating officer who had prepared the sketch plan and the fair copy of the same. He said is examination-in-chief.

Q : Look at P6. Can you explain your rough sketch plan?

A : It is a sketch of an accident between a car BS9540 with motorcycle KP1706. It is at the vicinity of Km2, Jalan Lama Tutong Seria, Kg Serambangun, Tutong.

Q : What does 'E' indicate?

A : Broken glass found at bend area.

Q : Do you know where the shattered glass came from?

A : The motorcycle KP1706.

Q : How do you know the shattered glass came from KP1706?

A : Based on the damages sustained by the motorcycle.

Q : Was there a lot of glass?

A : Yes.

Q : Did you see shattered glass anywhere else on the road?

A : Also found in the middle road of the dividing lane. Marked by witness.

Q : Why was this not indicated on the rough sketch plan?

A : I forgot.

Q : Was there a lot of broken glass in the middle area?

A : Yes.

Q : Do you know where the broken glass found in middle road came from?

A : It came from the motorcycle.

Q : How do you know this?

A : It came from the motorcycle light.

Q : Is it possible that it was from another vehicle?

A : No.

Q : Were you there when the accident happened?

A : No.

[7] The magistrate however did not consider this part of the evidence in her judgment. The slight damage on the Mitsubishi Pajero of the appellant was well on the right side edge bumper of the vehicle and not the front right side of the vehicle. Given this evidence and couple with the testimony of PW4 above,

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

it is more likely that the accident or the point of impact happened in the middle of the road than at X2 as was the evidence of PW3 which well on to the side of the road.

[8] If PW3's version of the accident were to be accepted, then it would follow that the appellant's vehicle would have encroached on to the PW3's path even before he had negotiated the bend. If this is so, then there shouldn't be any case for the remnant of glass fragment to be found in the middle of the road at X which I found to be well out of the way from X2 ie PW3's alleged point of impact.

[9] I agree with Mr Ahmad Zakaria's submission that the point of impact was well at X in the middle of the road as evidenced by the shattered glass and evidence of PW4. X2 where further remnants of the broken glass from PW3's motorcycle were found was where the motorcycle ultimately rest after impact.

[10] Obviously there are conflicting version of the accident between the appellant and PW3. The magistrate was at liberty to accept PW3's version of the incident as credible and dislodge the appellant's. However given PW4's revealing and enlightening testimony which the Magistrate below failed to consider, I believe that her findings was against the weight of the evidence. Had she considered PW4's testimony as a whole I believe that she would have arrived at a different conclusion

[11] As regards to the issue of the correct practice of Section 221(5) of the Criminal Procedure Code (Cap 7), Mr Asnawi for the respondent submitted to me a case of *Muriaty Binti Abdul Hadi v Public Prosecutor* (Criminal Appeal No 4 of 2001) in which the Court of Appeal endorses the trial judge adverse comment on the absence of the evidence from the defendant on the case. I believe this case does not lend any support as to the methodology of how the s 221(5) is to be invoked.

[12] Section 221(5) of the Criminal Procedure Code reads:

> the fact that the accused does not give evidence on oath or affirmation may be made the subject of an adverse comment by the prosecution, and the court may draw such interference therefrom as it thinks fit.

[13] Given the adversarial nature of our court, I believe that the proper reading of the section is that, the defendant having made his election to remain silent and offer no evidence, the prosecution may if he chooses make adverse comments against the defendant's failure to do so. Only after having heard the prosecution adverse comment, can the court if it chooses to do so draw adverse inference from the defendant's election to remain silent.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Sep 30 14:04:10 2011
//caseml/case/mlj/10-Ansari_185494_126936_01

[14] I believe the operative word in the section is ' … the court may draw such interference therefrom …' The word 'therefrom' must mean the prosecution adverse comment. It follows that if the prosecution opted not to or failed to make any adverse comment, I believe the court is not obliged to draw any adverse inference from the defendant silence.

[15] The magistrate below gave adverse inference warning to the appellant after the latter had chose to remain silent, however there is nothing in the note of the proceeding or for that matter in the prosecution's submission below to suggest the prosecution making any adverse comment on the appellant's election to remain silent and offer no evidence. As such, I believe the magistrate adverse inference as against the appellant was misconstrued.

[16] Having made my findings above, I allow the appellant's appeal and accordingly quashed the conviction. I order that the fines to be refunded to the appellant.

Appeal allowed.

Reported by Ashok Kumar